

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CHARLES SAMFILIPPO,

Defendant-Appellant.

UNPUBLISHED

July 21, 2011

No. 296097

Wayne Circuit Court

LC No. 09-019731-01-FH

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful use of a motor vehicle, MCL 750.414, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ The trial court sentenced him to 18 months' imprisonment for the felon in possession of a firearm conviction and to a one year sentence for unlawful use of a motor vehicle. These sentences were to run concurrently with each other and consecutively to a two year sentence for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from two separate events that occurred on the same evening in June 2009. First, Catrina Compton's car was taken without her permission, and second, Theron Hoffman's home² was broken into and numerous items, including three guns (two rifles and a twelve gauge shotgun), were stolen. Compton and defendant were friends.

¹ The jury also convicted defendant of larceny of a firearm, MCL 750.357b, and larceny in a building, MCL 750.360, but these convictions were dismissed pursuant to an agreement between defendant and the prosecutor because the trial court failed to instruct the jury that mere presence was not sufficient to convict defendant as an aider and abetter of those offenses. The jury acquitted defendant of first-degree home invasion, MCL 750.110a(2).

² The home was actually owned by Hoffman's parents, but he lived there with his parents and other family members. Hoffman was the only person home on the night the house was broken into.

Hoffman and defendant were not friends, but they had grown up together and were neighbors. The police were dispatched to 1251 Lincoln Street to respond to a call about Compton's missing car. Compton told the police that she believed that defendant had taken her car. As the police were finishing their report for Compton's missing car, Hoffman approached them and stated that someone had broken into his house. The officers went into Hoffman's house, which was located at 1257 Lincoln Street, to investigate. They observed that the house was in total disarray. Hoffman stated that the house was damaged extensively and that three guns, an X Box 360, a Playstation 2, a bag of socks, a purse, and a bow and arrow were missing.

Coincidentally, while the police were inside Hoffman's house investigating, defendant and his co-defendant, Nicholas Springstead,³ arrived at 1251 Lincoln Street in Compton's vehicle. Defendant was driving. The police arrested both defendant and Springstead in connection with the taking of Compton's car and the invasion of Hoffman's home. The police recovered many of the items removed from Hoffman's home, but they did not recover any guns.

Defendant did not testify at trial, but defense counsel stated during both opening and closing arguments that defendant took Compton's car without permission and used it and that a guilty verdict on the unlawful possession of a motor vehicle charge was appropriate. As noted above, the jury convicted defendant of unlawful use of a motor vehicle, felon in possession of a firearm, felony-firearm, larceny of a firearm and larceny in a building. At a sentencing hearing on December 17, 2009, the parties stipulated that the trial court failed to read the mere presence aiding and abetting instruction to the jury. Therefore, the prosecutor agreed to dismiss the charges of larceny of a firearm and larceny in a building. In exchange, defendant agreed that he was "giving up [his] right to file [an appeal] as to the aiding and abetting issues on the counts that are now being vacated."

On September 22, 2010, defendant filed his brief on appeal, as well as a motion to remand to permit him to move for a new trial on the convictions that were not vacated. We granted defendant's motion to allow him to move for a new trial. *People v Samfilippo*, unpublished order of the Court of Appeals, entered November 15, 2010 (Docket No. 296097). On remand, the trial court denied defendant's motion for a new trial. The trial court's rationale for denying the motion was that defendant was essentially arguing that the trial court's aiding and abetting instruction was improper, and defendant had agreed, in reaching the agreement with the prosecutor regarding the dismissal of the larceny convictions, to waive any argument on appeal regarding aiding and abetting with respect to the larceny convictions.

II. ANALYSIS

Defendant argues that the evidence is insufficient to sustain his felony-firearm and felon in possession of a firearm convictions. Specifically, defendant contends that there was insufficient evidence regarding the possession elements of those offenses.

³ Defendant and Springstead were tried jointly, but with separate juries.

Due process prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence in a criminal case, a reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). All conflicts in the evidence must be resolved in the favor of the prosecution. *Id.* Circumstantial evidence and the reasonable inferences therefrom can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Under the felon in possession of a firearm statute, MCL 750.224f, unless certain exceptions apply, “a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm . . .” MCL 750.224f(1). The purpose of the statute is to keep guns out of the hands of those most likely to use them against the public. *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001). The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant had been convicted of a prior felony, and (3) less than five years had elapsed since the defendant had been discharged from parole or probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004).

The purpose of the felony-firearm statute is to reduce the possibility of injury to victims, passersby, and police officers during the course of a felony. *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant challenges the possession elements of both offenses. Possession may be actual or constructive; it also may be joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A defendant has constructive possession if there is proximity to the firearm, together with an indicia of control. *Id.* Put another way, constructive possession exists when the defendant knew the gun’s location and the gun was reasonably accessible to him. *Id.* at 470-471. Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact. *Id.* at 469.

While there is no direct evidence that defendant actually or constructively possessed firearms, there is sufficient circumstantial evidence to support a finding of possession. There was evidence that Hoffman’s house was broken into and that three guns were stolen. In telephone conversations recorded while defendant was in jail and in his statement to Detective Rick Wiese, defendant denied breaking into Hoffman’s home and denied stealing things, including guns. However, in a telephone conversation with a woman identified as “Stacey,” he acknowledged that Springstead broke into Hoffman’s home and took the guns and then came to defendant with the stolen property and that he (defendant) took Compton’s car without her permission to get rid of the stolen property. When defendant and Springstead returned with Compton’s car, defendant was driving. Viewing this circumstantial evidence in a light most favorable to the prosecution, we find that the evidence permits the inference that Springstead stole the guns from Hoffman’s house and that defendant knew this and took Compton’s car without her permission and transported the stolen property, including the guns, in Compton’s car

in order to dispose of it. Thus, there was sufficient circumstantial evidence to permit the inference that defendant possessed a firearm.

Defendant asserts that the only proof that guns were stolen was the testimony of Hoffman, which defendant suggests was incredible. However, as noted above, in reviewing the sufficiency of the evidence in a criminal case, we must examine the evidence in a light most favorable to the prosecution and resolve all conflicts in the evidence in favor of the prosecution. *Terry*, 224 Mich App at 452. Furthermore, we must avoid weighing the proofs or determining what testimony to believe. *Id.* It is the function of the trier of fact, not this Court, to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant next argues that the trial court's failure to properly instruct the jury regarding mere presence being insufficient to sustain a conviction for aiding and abetting not only affected defendant's larceny convictions, but also caused the jury to wrongfully convict defendant of felon in possession of a firearm and felony-firearm. According to defendant, because of the erroneous aiding and abetting jury instruction, the jury had no choice but to find defendant guilty of felon in possession of a firearm and felony-firearm. As the trial court correctly concluded in denying defendant's motion for a new trial, defendant specifically agreed, in reaching the agreement with the prosecutor regarding the dismissal of the larceny convictions, to waive any argument on appeal regarding aiding and abetting with respect to the larceny convictions. The right to appeal is not absolute, and a defendant may make a conscious choice to waive the appeal of certain issues. *People v Rodriguez*, 192 Mich App 1, 5; 480 NW2d 287 (1991). Although defendant did not waive his right to appeal his felon in possession of a firearm and felony-firearm convictions, he did waive his right to appeal any issues regarding aiding and abetting with respect to the larceny convictions. Defendant's argument on appeal attempts to circumvent his waiver in this regard.

Even if defendant had not waived this issue, we would find it to be without merit. Irrespective of the erroneous aiding and abetting instruction, there was sufficient evidence to sustain defendant's felon in possession of a firearm conviction, for the reasons articulated above. We reject defendant's suggestion that the improper aiding and abetting jury instruction that led to the vacation of the larceny convictions impacted the jury's decision regarding defendant's guilt of felon in possession of a firearm, as the larceny convictions were not the underlying felony for this conviction. Regarding defendant's felony-firearm conviction, it is not necessary that the defendant be convicted of the underlying felony. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983). In this case, in addition to the vacated larceny convictions, first-degree home invasion could have served as the underlying felony for the felony-firearm conviction even though the jury acquitted defendant of first-degree home invasion. A jury may render apparently illogical or inconsistent verdicts, such as convicting a defendant of felony-firearm while acquitting him of the underlying felony. *Id.*; *People v Lewis*, 415 Mich 443, 452-453; 330 NW2d 16 (1982).

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro